

THOMAS G. VOLLMER,
PEGGY R. POSPESHIL,
MARY KENNAH,
PHILILP INGRAM,
ALBERT F. DIX,
STEVE MALLIA,
MICHELLE COLLINS,
BARBARA BUCHANAN,
H. DUANE KUNDERS, and
DR. ROBERT ROSENTHAL,
Individually, and On Behalf of
All Others Similarly Situated,

Plaintiffs,

v.

PUBLISHERS CLEARING HOUSE,
a New York Limited Partnership, and
CAMPUS SUBSCRIPTIONS, INC.,
a New York Corporation,

Defendants.

Deborah Zuckerman
Stacy Canan
AARP Foundation Litigation
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-6045

Counsel for Objectors

TABLE OF CONTENTS

I.	NOTICE REGARDING FAIRNESS HEARING	1
II.	INTRODUCTION	2
III.	AARP OBJECTORS	3
	A. AARP Members	3
	B. AARP	11
IV.	THE PROPOSED SETTLEMENT DOES NOT PROVIDE ADEQUATE RELIEF TO CLASS MEMBERS	13
	A. The Remedial Undertaking Allows PCH to Continue Sending Misleading and Deceptive Solicitations	13
	B. The “Readily Understandable Terms” Standard Will Not Adequately Protect Consumers	20
	C. Automatic Sweepstakes Entries Provide No Benefit And Only Serve to Legitimize PCH’s Practices	24
	D. The Proposed Settlement Provides Inadequate Refunds, and the Claims Process Discouraged Class Members from Seeking Refunds	24
V.	THE NOTICE OF CLASS ACTION AND PROPOSED SETTLEMENT WAS SO DEFECTIVE AS TO RENDER THE PROPOSED SETTLEMENT UNFAIR, UNREASONABLE AND INADEQUATE	25
	A. The Notice Was Not Legible for Many Class Members	27
	B. The Language Contained in the Notice Was Incomprehensible	28
	C. The Claim Process Contained in the Proposed Settlement Was So Burdensome and Difficult as to Effectively Prevent Class Members From Obtaining Monetary Relief	29
	1. Additional Notices Sent to Select Class Members Did Not Cure Defects of Original Notice	33

VI.	THE TERMS OF THE SETTLEMENT SHOULD NOT AFFECT ONGOING AND FUTURE STATE ENFORCEMENT ACTIONS AGAINST PCH WHERE THE STATES ARE SEEKING FORFEITURES, INJUNCTIVE RELIEF AND RESTITUTION	34
-----	---	----

VII.	CONCLUSION	34
------	------------------	----

EXHIBITS

II. INTRODUCTION

The AARP members whose sworn Affidavits are attached to these Objections and AARP (collectively referred to as “AARP Objectors”), on behalf of its millions of other members nationwide, submit these Objections to the proposed settlement in this case. AARP Objectors have grave concerns that the proposed settlement of this private class action lawsuit is insufficient to curtail the defendants’ most egregious solicitation methods or to provide class members with adequate redress. First, AARP Objectors believe that, despite the proposed settlement, Publishers Clearing House (PCH) still will be allowed to send hundreds of millions of American households repeated sweepstakes solicitations that mislead them into believing that a purchase will increase their chances of winning. Second, AARP Objectors view the monies initially designated for refunds as insufficient and the refund and rescission process as confusing and unduly burdensome.¹ Third, AARP Objectors believe the Notice of Class Action, Proposed Settlement and Final Fairness Hearing (“Settlement Notice”) was extremely confusing, difficult to understand, and not reasonably designed to fully and fairly inform class members about their rights and options so as to allow them to make an informed decision as to what course to pursue. In fact, the Notice’s print and format were not reasonably designed to even get class members to open and read it, in sharp contrast to the way PCH designs the envelopes it uses for its sweepstakes mailings. Fourth, in light of the inadequacy of the injunctive and monetary relief provided by the proposed settlement, AARP Objectors also are greatly concerned about the potential preemptive effect of the settlement on other pending and future lawsuits challenging

¹ As discussed below, AARP Objectors believe that Defendants’ Notification Relating to the Distribution of the Proposed Settlement Fund, filed after the expiration of the deadline for seeking refunds, did not cure this defect of the proposed settlement.

PCH's sweepstakes promotions, particularly those brought by state enforcement agencies.

For all of the foregoing reasons, discussed more fully below, AARP Objectors respectfully urge this Court to reject the proposed settlement.

V. THE NOTICE OF CLASS ACTION AND PROPOSED SETTLEMENT WAS SO DEFECTIVE AS TO RENDER THE PROPOSED SETTLEMENT UNFAIR, UNREASONABLE AND INADEQUATE

AARP Objectors agree with the attorneys general Objections filed in this case that the Notice mailed to class members not only failed to adequately inform class members regarding the case and their rights and options thereto, but it affirmatively discouraged them from pursuing refunds and claims from PCH. Since the Notice in this case combined both notice of the class action and the proposed settlement, it needed to provide class members with essential information that would enable them to make a knowing and intelligent decision whether to be bound by the settlement. Admittedly, the Notice needed to provide a large amount of complicated information. For example, the Notice needed to inform class members about: (1) the nature of the case, (2) the likelihood that individual members would receive monetary relief as a result of the settlement and an estimated amount of such relief, (3) whether other similar litigation or actions against PCH existed that could affect the class member, (4) the proposed injunctive relief, (5) how to make a claim, (6) how to opt out, and (7) the breadth of the release. *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977); Herbert Newberg and Alba Conte, *Newberg on Class Actions*, §8.33 (3d. ed. 1992).

Importantly, this information needed to be provided in a manner that was comprehensible to "the minimally sophisticated lay person." *Newberg, supra*, at §8.32; *Avery v. Heckler*, 762 F.2d 158 (1st Cir. 1985). The Notice in the instant case needed to contain clear and simple

language in an easily readable format since the proposed class consists of 40 million people, an extraordinarily huge class, and many of the class members are elderly and/or unsophisticated consumers. *See* Second Amended Class Action Complaint, ¶ 18. The Notice that was sent, however, failed in every respect to clearly, simply, and adequately inform class members of the necessary information they needed to make an informed choice regarding their rights, releases, and claims.

Courts have a duty to determine whether a class action settlement is fair, reasonable and adequate. *Piambino v. Bailey*, 610 F.2d 1306 (5th Cir.), *cert. denied*, 449 U.S. 1011 (1980); *Grunin v. International House of Pancakes*, 513 F.2d 114, 123 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975); *Newberg, supra*, at §11.41. In carrying out its duty, the Court must determine whether the settlement properly safeguards the interests of absent class members since they effectively will relinquish their litigation rights if the settlement is approved.

This Court, therefore, should not approve the proposed settlement since the Notice was so seriously flawed that class members were not fairly and adequately informed regarding their rights, remedies and options. In short, the Notice failed to provide AARP Objectors, and other unnamed class members, with the minimal protections guaranteed by the due process clause of the United States Constitution and Fed. R. Civ. P. 23.

A. The Notice Was Not Legible for Many Class Members

The first among the many defects of the notice was that it was physically difficult, and even impossible, for many class members even to read. Many AARP Objectors were unable to

read the notice because the print “font” size was too small.² For example, Objectors Cimino and Meletiou state that they were not able to read the Notice because the “print was too small.” See Exs. 1 and 2, Affidavits of Cimino and Meletiou. In addition to the named Objectors herein, a substantial number of other AARP members, who also are class members herein, similarly complained that the form of the Notice was unreadable because the print was too small.

AARP Objectors are particularly concerned that the Notice was printed in a format that was not legible for many older people. Over 60 percent of persons considered visually impaired are older persons. By the age of 65, virtually every person suffers some loss in ability to focus, discern colors, and adapt to light. One of the crucial factors affecting reading ease and ability is type style and size. AARP, *Truth About Aging, Guidelines For Accurate Communications* 25, 27 (1986.) Lighthouse International, a research and advocacy association for people who are visually impaired, recently published legibility and color contrast guidelines for printed materials. The guidelines note that “big type is best” because it is easier to read not only for people who are visually impaired, but also for all people as they age. The Lighthouse found that print should be 16 to 18 points, depending on the typeface and level of contrast, in order to make text accessible to people with a broader range of visual capabilities.

<http://www.lighthouse.org/largetype/leadpr.html>, citing The Arlene R. Gordon Research Institute, Aries Ardit, *Typography, Print Legibility, and Low Vision* (1996).

B. The Language Contained in the Notice Was Incomprehensible

The second procedural hurdle that faced AARP Objectors and other qualified class

² The Notice’s type size is 8 points. [This is a sample of 8 point type.] See Ex. 19, Notice of Class Action and Settlement. The type size in this pleading is 12 points and in this footnote is 10 points. Compare the size of the Notice print with the print contained in many of the PCH sweepstake’s mailings. PCH usually uses print size that is larger than 14 points for its solicitation language. See Ex. 20, examples of PCH mail received by AARP members.

members was that the Notice was incomprehensible, thereby precluding them from either filing a claim or opting out of the case. Objectors stated that they simply could not understand the contents of the Notice. The Notice is written almost entirely in legal vernacular and terminology that is unfamiliar and incomprehensible to laypersons. “Too much legal jargon [in a Rule 23 notice] might not be readily understood by the average class member.” *Newberg, supra*, at § 8.31. Due to the incomprehensible language contained in the Notice, countless class members, including AARP Objectors herein, were unable to make a knowing and intelligent decision regarding whether to participate in or opt out of the case.

AARP Objectors Cimino, Meletiou, Fromm, Austin, Franklin, Seifer, Turner, Williamson, Haley, Badolato, and Colgan stated that since they did not understand the Notice’s description of the class action or how to file a claim for reimbursement, they neither filed a claim, notwithstanding that they were qualified claimants under the proposed settlement, nor opted out of the case so that they could benefit from their attorney general’s action against PCH, if available, or pursue a private action for relief. *See* Exs. 1 through 11, Objector Affidavits. As a result, said AARP Objectors have been effectively denied their right to relief in this case and will be precluded from obtaining relief in another forum if the present settlement is approved.

For example, Objector Colgan, a qualified subclass member, stated that she tried to understand the contents of the Notice but could not. *See* Ex. 11. Objector Fromm, another qualified subclass member, stated that he “couldn’t figure out the instructions.” *See* Ex. 3. Objector Meletiou stated that she believed that she needed to hire a lawyer in order to be part of the class. Since she could not afford to hire a lawyer, she took no action. *See* Ex. 2.

Objector Turner, another qualified subclass member, read the Notice but did not

understand its contents. She believed that she did not need to act in order to obtain relief, but would automatically receive a refund of the money she was misled into spending on PCH merchandise and magazines. *See* Ex. 7.

C. The Claim Process Contained in the Proposed Settlement Was So Burdensome and Difficult as to Effectively Prevent Class Members From Obtaining Monetary Relief

AARP Objectors also were unable to follow the instructions contained in the Notice and therefore were thwarted from seeking restitution from PCH in the case, notwithstanding that they were qualified claimants under the proposed settlement. Under the terms of the Notice, in order for class members to receive a refund for merchandise or magazines purchased from PCH, they were required to: (1) file a claim containing a description of every item purchased, the date of purchase and the amount paid; and (2) return all merchandise purchased. If the class member could not return the merchandise, he or she has to sign a sworn affidavit under penalty of perjury stating: (1) the reason the merchandise could not be returned; (2) the merchandise was purchased to increase the chances of winning the sweepstakes; and (3) the class member received no material value from the merchandise through use, resale or giving it to a third party.

AARP Objectors maintain that the claim process was unfairly complicated and appears to have been designed to limit the number of claims submitted in the case. Not only was the Notice's failure to contain a sample claim form a substantial defect, but the Notice required claimants to comply with a series of burdensome requirements to support a claim. The burdensome requirements were even more chilling to the claim process when viewed in

conjunction with the “pro rata” refunds that were stated in the original Notice.³ Under the original Notice, only an estimated \$4 million of the \$10 million settlement fund appeared to be available to pay claims, a grossly inadequate amount of money to compensate a 40 million member class.⁴ Many class members were unwilling either to compile and prepare the lengthy and arduous claim, or spend a substantial amount of money on postage, when it appeared probable that they would only receive a small fraction of the amount of money requested.

The claim process contained many unduly burdensome hurdles. Among others, it required class members to submit a statement containing a description of every item or magazine purchased, the date of the purchase, and amount paid for the item. A claim process requiring claimants to submit a general statement regarding items purchased would have been reasonable. However, in the instant case, since consumers ordinarily do not keep receipts for every item ever purchased for the past seven years, many class member said that they were unable to provide an itemization of merchandise purchased, dates of purchases, and purchase prices. In fact, countless AARP members informed counsel that they did not seek a refund because they did not possess their receipts. Among them, Objector Haley stated that she did not request a refund in this case because she did not have her receipts. *See* Ex. 9, Haley Affidavit. Thus, this requirement unfairly deterred too many class members from submitting claims. Moreover, this requirement was not only overly severe to class members, but was pointless in

³ PCH’s recent agreement to pay 100% of accepted claims was filed after the deadline passed for submitting claims and therefore was too late to have cured this defect. In light of PCH’s new agreement to pay full restitution, the parties would need to provide class members with a renewed notice and opportunity to seek a refund in order to cure this defect. Even then, only a vastly simplified claim process will make the availability of more monetary relief meaningful.

⁴ *See* explanation regarding inadequacy of the original settlement fund amount in Objections of the attorneys general, section V.B., C. AARP Objectors incorporate by reference said Objections.

light of the fact that PCH's Chief Information Officer has submitted evidence in this case attesting that PCH maintains customer records that reflect the history of customer purchases. *See* Affidavit of Stephen Miller at ¶s 8-10, filed July 29, 1999 as part of Defendants' Memorandum in Support of Parties' Joint Motion for Order Approving Notice Plan.⁵

AARP Objectors also take issue with the requirement that subclass members physically return merchandise to PCH. This requirement presented a huge obstacle to countless class members. Moreover, this requirement is nonsensical. There is no reason for consumers to return merchandise as a proof of their claims in the present case. The Objectors herein all have stated that they would not have purchased said items from PCH had they not been misled into believing that they needed to buy the items in order to increase their chances of winning the PCH sweepstakes. *See* Exs. 1 - 12, Objector Affidavits.⁶ It is implausible to believe that PCH will benefit from the return of old and used merchandise. This requirement therefore appears aimed at either deterring claims or punishing claimants.

Although the Notice permitted class members to submit an affidavit attesting to purchases and lack of any material benefit derived from the items purchased in lieu of returning items, the claim process remained unduly burdensome. Most class members were unable to prepare an affidavit that stated that they recognized no material value from the merchandise through use, resale, or giving the item away. It is not relevant that many AARP Objectors, who otherwise

⁵ *See also* attachments to Ex. 2, Meletiou Affidavit, which include a letter from PCH to Ms. Meletiou itemizing her PCH purchases. Significantly, this letter illustrates that PCH has the capability to inform class members with specificity of their PCH purchases.

⁶ In fact, many Objectors state that they did not use the merchandise or that the quality of the merchandise was so substandard that they could not use it. Nevertheless, Objectors did not return the merchandise and file a claim because they either did not understand the claim instructions, could not afford the postage, or found the process too burdensome.

were misled by PCH's promotions, have used, given away, or even sold the merchandise. This fact should not have been a bar to obtaining monetary relief from a company that misled them into making purchases in the first place.

Many AARP Objectors and class members found the settlement claim process to be daunting. Countless AARP members informed counsel that they did not file a claim with PCH because they either no longer had the merchandise that they bought or could not afford to return the merchandise that they did have.

For example, Objector Austin stated that she could not afford to pay the postage that it would have cost her to return the merchandise. *See* Ex. 4, Austin Affidavit. Objector Dorothy Valente, the only named AARP Objector who did seek a refund as part of the proposed settlement, stated that in order to comply with the Notice's procedure, she had to ship nine cartons of merchandise to PCH. She paid \$147 to ship the merchandise. She also stated that she could not have returned the items without the help of her son. *See* Ex. 12, Valente Affidavit.

Also, many of the AARP Objectors stated that they did not seek a refund because they could neither mail the merchandise back to PCH nor sign a sworn affidavit stating that "under penalty of perjury" they received "no benefit" from the merchandise because some of the merchandise was given away to others or used. *See, e.g.,* Ex. 3, Fromm Affidavit.

All of the AARP Objectors are examples of class members who suffered substantial damages as a result of PCH's misleading sweepstakes promotions and yet have been precluded from benefitting from the class action as a result of an unfair, arbitrary, and burdensome claim process. For example, Objector Franklin, lives on a meager \$521 per month from social security disability and spent approximately \$4,000 for PCH merchandise that she could not afford

because she was misled into believing that she was about to win the PCH sweepstakes. She continued buying PCH merchandise in order to assure her win. *See* Ex. 5, Franklin Affidavit. Additionally, AARP Objector Williamson spent approximately \$6,000 - \$7,000 on PCH merchandise and AARP Objector Badolato spent approximately \$3,000 on PCH merchandise but did not request refunds because they did not understand the Notice. *See* Exs. 8 and 10 , Williamson and Badolato Affidavits.

1. Additional Notices Sent to Select Class Members Did Not Cure Defects of Original Notice

Due to the substantial number of questions and inquiries regarding the Notice addressed to the Court and class counsel, additional notices were sent to select class members for the purpose of clarifying the original class notice and claim process. However, the additional notices did not cure the substantial defects of the original Notice. The additional notices did not help any of the AARP Objectors to better understand the case or their options. Furthermore, many of the AARP Objectors did not even receive the additional purported clarifying notices.

AARP Objectors thus respectfully request that this Court reject the proposed settlement.

Dated: December 6, 1999

Stacy J. Canan

Deborah M. Zuckerman

AARP Foundation Litigation
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-6045
Counsel for AARP Objectors